

CALIFORNIA COASTAL COMMISSION

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Items 14c, 14d

Staff: CAC-SF
Staff Report: April 25, 2005
Hearing Date: May 12, 2005

STAFF REPORT AND FINDINGS FOR NOTICE OF VIOLATION AND CEASE AND DESIST ORDER

CEASE AND DESIST ORDER: CCC-05-NOV-03 and CCC-05-CD-05

RELATED VIOLATION FILE: V-4-05-030

PROPERTY LOCATION: 26530 Latigo Shore Drive, Malibu, Los Angeles County (APN 4460-019-143) (**Exhibit 1**)

DESCRIPTION OF PROPERTY: A .29-acre parcel located between the seaward side of Latigo Shore Drive and the beach, containing a 4,615 square-foot single-family residence built on an artificial fill slope that fronts an approximately 90 linear foot stretch of sandy beach

PROPERTY OWNER: Bert Kelley

VIOLATION DESCRIPTION: Construction of a rock revetment using mechanized equipment, a front yard wall, a path with stairs, a non-structural concrete slab, twenty below grade "soldier piles", and a wall built on top of the soldier piles; grading (cut and fill); importation of fill and construction of a fill slope.

SUBSTANTIVE FILE DOCUMENTS:

1. Executive Cease and Desist Order No. ED-05-CD-01;
2. Notice of Violation and Cease and Desist Order files No. CCC-05-NOV-03 and CCC-05-CD-05;

3. Coastal Development Permit No. 5-88-794;
4. Amendment Applications No. 5-88-794-A1, 5-88-794-A2, 5-88-794-A3, and 5-88-794-A4;
5. Exhibits 1 through 18.

CEQA STATUS:

Exempt (CEQA Guidelines (CG) §§ 15060(c)(2)), and Categorically Exempt (CG §§ 15061(b)(2), 15037, 15038, and 15321).

I. SUMMARY OF STAFF RECOMMENDATION

The Kelley property, located at 26530 Latigo Shore Drive in Malibu (“subject property”), consists of a .29-acre parcel located on the seaward side of Latigo Shore Drive, southwest of the Latigo Shore Drive/Pacific Coast Highway intersection in Malibu. A 4,615 square-foot single-family residence supported by caissons is located in the middle of the subject property. The subject property was established, and the residence was constructed, pursuant to Coastal Development Permit (“CDP”) No. 5-88-794. Bert Kelley is the owner of the subject property.

Unpermitted development on the subject property includes grading (cut and fill), importation of fill and construction of a fill slope, and construction of a rock revetment, a front yard wall, a path with stairs, a non-structural concrete slab, twenty below grade “soldier piles”, and a wall built on top of the soldier piles (“soldier pile-wall”).

On March 3, 2005, Commission staff confirmed an anonymous report that mechanized equipment was used on the beach to grade the beach and construct an approximately 90-foot long rock revetment on the sandy beach. Pursuant to his authority under Coastal Act Section 30809, the Executive Director issued a Notice of Intent to Issue an Executive Director Cease and Desist Order (“EDCDO NOI”). When Mr. Kelley failed to provide a timely and satisfactory response, as required by Coastal Act Section 30809(b) and as defined by Section 13180 of the Commission’s Regulations, the Executive Director issued Executive Cease and Desist Order No. ED-05-CD-01 (“EDCDO”). The EDCDO directed Mr. Kelley to immediately cease and desist all unpermitted development activity and to contact Commission staff to discuss a Commission-approved remedy, due to the risk of additional resource damage during removal. The EDCDO also notified Mr. Kelley, as required by Coastal Act Section 30812(g), of the potential for recordation of a Notice of Violation.

On March 15, 2005, Commission staff sent a Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order and Restoration Order Proceedings (“CDO NOI”) to Mr. Kelley. In addition to the revetment observed by staff during the March 3, 2005 site visit, the CDO NOI included additional unpermitted development that is present at the site. Mr. Kelley has submitted an application, which is incomplete, to amend CDP No. 5-88-794 to obtain after-the-fact authorization for some of this development. Staff addresses this

amendment application, CDP No. 5-88-794-A4 (“Amendment A4”), in CCC-05-CD-05, as discussed further herein.

The activity that has occurred at the subject property constitutes development, as defined in Section 30106 of the Coastal Act. The development was undertaken without a Coastal Development Permit, in violation of Coastal Act Section 30600. The unpermitted development is also inconsistent with CDP No. 5-88-794. In addition, although not a required finding for the issuance of a cease and desist order, the grading of the beach and construction of the rock revetment are inconsistent with the policies of Chapter 3 of the Coastal Act.

The Coastal Commission has jurisdiction to take enforcement action to remedy these violations because the violation involves development that is specifically prohibited by a CDP previously approved by the Commission. In addition, it appears that the rock revetment may be located on public tidelands that remain subject to the Commission's jurisdiction even after certification of a local coastal program.

Staff recommends that the Commission approve Cease and Desist Order No. CCC-05-CD-05 (“the Order”, as described below) directing Bert Kelley, as owner of property at 26530 Latigo Shore Drive (“subject property”), to: 1) cease and desist from conducting any further development without a Coastal Development Permit, 2) remove the rock revetment in accordance with the terms and conditions of the Order, 3) restore the disturbed sandy beach area seaward of his residence through restorative grading, 4) complete amendment application 5-88-794-A4 (“Amendment A4”) in accordance with the terms of the Order, and 5) remove any unpermitted development that remains on the subject property after the Commission has taken action on said amendment application.

Staff also recommends that the Commission find that a violation of the Coastal Act has occurred on the subject property. Staff asserts that Mr. Kelley violated the Coastal Act by undertaking development on the subject property without obtaining a coastal development permit (“CDP”) and in direct conflict with the special conditions of an existing CDP, CDP No. 5-88-794. On March 15, 2005, the Executive Director notified Mr. Kelley of his intent to record a Notice of Violation, as required under Coastal Act Section 30812, and provided Mr. Kelley with an opportunity to object to the recordation of a Notice of Violation. On April 14, 2005, staff received a written objection from Kelley. If the Commission finds that a violation has occurred, the Executive Director shall record a Notice of Violation in the office of the Los Angeles County Recorder.

II. HEARING PROCEDURES

A. Cease and Desist Order

The procedures for a hearing on a proposed Cease and Desist Order are set forth in Section 13195 of the California Code of Regulations (CCR), Title 14, Division 5.5, Chapter 5, Subchapter 8.

For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all alleged violators or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, in his or her discretion, to ask of any person, other than the violator or its representative. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in CCR section 13185 and 13186 incorporating by reference section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions of any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per staff recommendation or as amended by the Commission, will result in issuance of the order.

B. Notice of Violation

The procedures for a hearing on whether a violation has occurred are set forth in Coastal Act Section 30812 (c) and (d) as follows:

(c) If the owner submits a timely objection to the proposed filing of the notice of violation, a public hearing shall be held at the next regularly scheduled commission meeting for which adequate public notice can be provided, at which the owner may present evidence to the commission why the notice of violation should not be recorded. The hearing may be postponed for cause for not more than 90 days after the date of the receipt of the objection to recordation of the notice of violation.

(d) If, after the commission has completed its hearing and the owner has been given the opportunity to present evidence, the commission finds that, based on substantial evidence, a violation has occurred, the executive director shall record the notice of violation in the office of each county recorder where all or part of the real property is located. If the commission finds that no violation has occurred, the executive director shall mail a clearance letter to the owner of the real property.

The Commission shall determine, by a majority vote of those present and voting, whether a violation has occurred. Passage of a motion, per staff recommendation or as amended by the

Commission, will result in the Executive Director's recordation of a Notice of Violation in the Los Angeles County Recorder's Office.

III. STAFF RECOMMENDATION

1.A. Motion Re: Notice of Violation:

I move that the Commission find that a violation has occurred, as described in the staff recommendation for CCC-05-CD-05.

1.B. Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in the Executive Director recording Notice of Violation No. CCC-05-NOV-03. The motion passes only by an affirmative vote of the majority of Commissioners present.

1.C. Resolution That a Violation of the Coastal Act Has Occurred:

The Commission hereby finds that a violation of the Coastal Act has occurred, as described in the findings below, and adopts the findings set forth below in the grounds that development has occurred without a coastal development permit and that development has occurred that is inconsistent with a permit previously issued by the Commission.

2.A. Motion Re: Cease and Desist Order:

I move that the Commission issue Cease and Desist Order No. CCC-05-CD-05 pursuant to the staff recommendation.

2.B. Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in the issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

2C. Resolution to Issue Cease and Desist Order:

The Commission hereby issues Cease and Desist Order No. CCC-05-CD-05, as set forth below, and adopts the findings set forth below on grounds that development has occurred without a coastal development permit, development has occurred that is inconsistent with a permit previously issued by the Commission, in violation of the Coastal Act, and the requirements of the Order are necessary to ensure compliance with the Coastal Act.

IV. FINDINGS FOR NOTICE OF VIOLATION CCC-05-NOV-03 AND CEASE AND DESIST ORDER CCC-05-CD-05

A. Permit History

On December 13, 1988, the Commission approved CDP No. 5-88-794 subject to ten special conditions. The permit was issued on July 3, 1990, authorizing the subdivision of APN 4460-019-026 into three parcels (APNs 4460-019-143, -144, -145) and construction of three single-family residences (**Exhibit 2**). The subject property (APN 4460-019-143) is a .29-acre parcel that was created pursuant to this subdivision. Special conditions relevant to this Cease and Desist Order are described in Section D2 below.

The permit runs with the land and is binding on Kelley, as a successor owner. Moreover, the permit required the recordation of deed restrictions pertaining to assumption of risk and future development, as well as offers to dedicate both vertical and lateral easements. These documents were recorded, and therefore, Mr. Kelley had legal notice of them when he purchased the subject property on February 28, 1997. Mr. Kelley has extensive knowledge of the permit and its conditions, and in fact, has applied to amend the permit three times.

1. Previous Applications to Amend CDP No. 5-88-794

Mr. Kelley has submitted three separate applications to the Commission, each seeking to amend CDP No. 5-88-794.¹ As of the date of this report, the Commission has approved no amendment.

a. Amendment Application No. 5-88-794-A2

Mr. Kelley submitted amendment application No. 5-88-794-A2 on January 9, 1998. The application sought after-the-fact approval for the following development:

1. Relocation of the single-family residence on the subject property 10 feet seaward from the plan approved by the Commission under CDP No. 5-88-794;
2. Installation of 20 below grade soldier piles along the western boundary of the subject property;²
3. Construction of a vertical boundary wall built on top of the soldier piles extending from Latigo Shore Drive to the “25-foot contour line”; and
4. Construction of a wall extending across the entire northern (landward) boundary of the subject property.

Staff deemed this application complete, and the matter was scheduled to be heard by the Commission during the November 1998 Commission hearing. The matter was postponed until

¹ A previous amendment application, No. 5-88-794-A1, was submitted by Jeanette Goldbaum on April 2, 1990. Staff deemed the application incomplete and returned it to Mrs. Goldbaum on April 25, 1990.

² Staff notes that at least four of these soldier piles extend under the sandy beach seaward of the residence.

the April 1999 Commission hearing. However, Mr. Kelley withdrew this application prior to the hearing.

b. Amendment Application 5-88-794-A3

On October 13, 1988, Mr. Kelley once again sought to amend CDP No. 5-88-794. He submitted application No. 5-88-794-A3, requesting the removal of Special Condition No. 3, which established the vertical access easement, from the permit. Staff deemed this application complete and the matter was scheduled to be heard at the November 1998 Commission hearing. As with 5-88-794-A2, this matter was postponed, rescheduled for the April 1999 Commission hearing, and withdrawn by Mr. Kelley prior to the hearing.

2. Current Amendment Application: No. 5-88-794-A4

On August 19, 1999, Kelly submitted a third application to amend CDP No. 5-88-794 (**Exhibit 3**). This application requests after-the-fact approval for much of the same development listed in application No. 5-88-794-A2:

1. Relocation of the single-family residence on the subject property 10 feet seaward from the plan approved by the Commission under CDP No. 5-88-794;
2. Installation of 20 below grade soldier piles along the western boundary of the subject property;
3. Construction of a vertical boundary wall (6-foot maximum height), built on top of the soldier piles extending from Latigo Shore Drive to the "25-foot contour line"; and
4. Construction of a wall (6-foot maximum height), extending across the entire northern (landward) boundary of the subject property.

Mr. Kelley also seeks after-the-fact approval for the following development that was not included in previous amendment applications:

1. Extension of the existing building pad along with the repair of the artificial slope (125 cu. yards cut on-site and 225 cu. yards of fill from caisson installation on adjacent property);
2. Placement of sod atop artificial bluff mentioned in #1;
3. Installation of a non-structural slab; and
4. Installation of non-structural framing around existing structural caissons.

In addition to requesting after-the-fact authorization for the above development, Mr. Kelley also requests the following:

1. Approval to abandon the existing vertical easement established pursuant to Special Condition No. 3 of CDP No. 5-88-794; and
2. Approval to modify the existing lateral access easement established pursuant to Special Condition No. 2 of CDP No. 5-88-794.

Staff determined that additional materials were required to complete this application, and sent a letter to Mr. Kelley on September 17, 1999 (**Exhibit 4**). The letter informed him of this determination and listed the required materials.

On November 24, 1999, Darren Domingue, representative for Mr. Kelley with regards to Amendment A4, submitted additional materials in response to staff's September 17, 1999 letter. After reviewing the materials, staff concluded that the application remained incomplete. A second letter was sent to Mr. Kelley on January 20, 2000, again listing the materials required to complete the permit (**Exhibit 5**).

On April 12, 2000, Mr. Domingue submitted additional materials in response to the January 20, 2000 letter from staff. Despite the third submittal, materials that staff required to make an informed decision regarding the proposed amendment were not provided. On July 21, 2000, staff sent Mr. Kelley a letter specifying which required materials were still missing from the application (**Exhibit 6**). An October 19, 2000 response by Mr. Domingue failed to provide the information necessary to complete the application. Subsequently, Commission staff spoke with Mr. Kelley on numerous occasions, including but not limited to May 31, 2001 and June 1, 2001, reminding him of the incomplete status of his application. As of the date of this report, Amendment A4 remains incomplete. During a phone conversation with staff on April 15, 2005, Kelley's attorney stated that Mr. Kelley was willing to complete Amendment A4 in order to schedule the matter for action by the Commission at a Commission hearing.

Commission staff and Mr. Kelley attempted to resolve this matter administratively. Ultimately, these repeated attempts were unsuccessful.

B. History of Violations

1. Unpermitted Revetment and EDCDO

On March 3, 2005, enforcement staff at the Commission's South Central Coast District office received a report, including photographs, from an anonymous source that mechanized equipment was being used on the sandy beach seaward of Kelley's residence (**Exhibit 7**). In the photographs, a bulldozer is removing sand from the beach, creating a trench. Rocks placed in the trench are clearly visible in the photographs, presumably forming the toe of the rock revetment. Staff visited the site later that day and observed tread marks from mechanized machinery, and a rock revetment (**Exhibit 8**). The revetment extends approximately 90 linear feet across the sandy beach area at the base of the fill slope on the subject property and reaches a height of approximately one-third the height of the fill slope. Commission staff visited the site

and confirmed that this unpermitted development was in place. By the tracks still present on the beach, it was evident that the work had recently occurred. On March 4, 2005, in an effort to halt further unpermitted development activity and resource damage, the Executive Director issued a Notice of Intent to Issue an Executive Director Cease and Desist Order ("EDCDO NOI"), which was hand-delivered to Kelley's residence by Commission staff on that day and was also sent via regular and certified mail (**Exhibit 9**).

The EDCDO NOI stated, "I [Executive Director] intend to issue a Cease and Desist Order against you unless you respond to letter in a 'satisfactory manner'...no later than 5:00 pm today." Neither Mr. Kelley nor an agent or representative speaking on behalf of Mr. Kelley responded in a "satisfactory manner", as defined in Coastal Act Section 30809(b) and Section 13180 of the Commission's Regulations, before the 5:00 pm deadline. Consequently, on March 4, 2005, pursuant to his authority under Coastal Act Section 30809, the Executive Director issued Executive Cease and Desist Order No. ED-05-CD-01 (EDCDO) (**Exhibit 10**). The EDCDO was also hand-delivered to Kelley's residence and sent to Mr. Kelley via regular and certified mail.³ Mr. Kelley asserts that no additional work on the revetment was undertaken after he received the order. However, the revetment appears to have been completed before the order was issued on March 4, 2005.

2. Response to the EDCDO

Commission staff received a telephone call from Kelley's attorney on March 7, 2005, confirming that Mr. Kelley received the EDCDO NOI and EDCDO. He indicated that Mr. Kelley was willing to remove the revetment, and was told by Commission staff that removal is itself "development" as defined in the Coastal Act, and would have to be undertaken pursuant to a cease and desist order in order to ensure appropriate removal and restoration and to minimize additional environmental impacts.

3. Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order and Restoration Order Proceedings

The EDCDO directed Mr. Kelley not to remove the revetment without further instruction from Commission staff to ensure that removal does not cause added environmental damage, due to the fact that the revetment was constructed through the use of mechanized equipment on the beach and that an unknown quantity of rock was placed in trenches of unknown depth. Removal of the revetment must be conducted in accordance with the terms and conditions of CCC-05-CD-04, to

³ Coastal Act Section 30809(b) states:

The Cease and Desist Order shall be issued only if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner....

Commission staff attempted to give Mr. Kelley both oral notice and hand-delivered written notice when they went to Kelley's residence. The Notice of Intent and the Executive Cease and Desist Order were hand delivered to the residence. Mr. Kelley was apparently not home when staff hand delivered the documents.

ensure appropriate removal and restoration procedures, ensure compliance with the policies of Chapter 3 of the Coastal Act, and minimize additional impacts to the sandy beach.

In order to address removal of the violation, the Executive Director issued a Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order and Restoration Order Proceedings ("CDO NOI"), which was sent to Mr. Kelley via regular and certified mail on March 15, 2005 (**Exhibit 11**).⁴ The CDO NOI pertained to all unpermitted development on the subject property observed on the subject property by staff during the March 3, 2005 site visit, including that which is contained in Amendment A4. Although Mr. Kelley seeks after-the-fact approval from the Commission for this unpermitted development, the application is still incomplete. Therefore, no Commission hearing on the amendment application has occurred, the Commission has taken no action in the matter, and the development is unpermitted. This development is included in the CDO NOI in an effort to address all unpermitted development at the site. Amendment A4 does not address the revetment or grading of the beach. However, the Order is drafted to recognize the pending application for Amendment A4 and to allow for a timely Commission decision on the application.

On March 28, 2005 Kelley's attorney stated that Mike Cheap, "a friend of Mr. Kelley's and a contractor", constructed the revetment as a temporary emergency measure to protect Kelley's property from heavy storms in the area. Mr. Kelley asserts that Mr. Cheap was told by staff at the Commission's South Central Coast District office to contact the City of Malibu, and was then given oral assurances from an official at the City of Malibu Environmental Building and Safety Department that he could proceed with implementation of shoreline protective structures prior to obtaining an emergency permit. City officials and Commission staff disagree with this account and deny making such statements regarding the emergency procedures at the subject property. Mr. Kelley cannot produce any written record of such authorization.

In fact, as early as November 20, 1997, in a phone conversation with Commission staff, Mr. Kelley specifically stated that he wanted to build a seawall in front of his residence and was told that such action was prohibited by Special Condition 10 of CDP No. 5-88-794, which required assurances that no beach structures would be necessary to protect the residence. Mr. Kelley was informed by staff that staff would not be able to recommend approval of any such application for a permit to construct a seawall, and that the permit application would most likely be denied pursuant to Section 13166(a) of the Commission's Regulations, which provide:

(a) The executive director shall reject an application for an amendment to an approved permit if he or she determines that the proposed amendment would lessen or avoid the intended effect of an approved or conditionally approved permit unless the applicant presents newly discovered material information, which he could not, with reasonable diligence, have discovered and produced before the permit was granted.

⁴ Commission staff has determined that all relief sought in this enforcement action can be accomplished through a cease and desist order, and that consequently, no restoration order is required.

Commission staff in the South Central Coast District office also informed Mr. Kelley on numerous occasions that construction of any form of shoreline protection structure seaward of his residence would be inconsistent with the Coastal Act, because such a structure was not necessary to protect the residence, which had been constructed on an engineered caisson grade-beam foundation in order to avoid the necessity of shoreline protective devices. In addition, staff also informed Kelly on several occasions that although the unpermitted fill slope seaward of the residence was expected to erode from wave action, construction of a shoreline protective device to protect the unpermitted fill slope would be clearly inconsistent with the policies of Chapter 3 of the Coastal Act, including Coastal Act Section 30235.

On March 29, 2005, Commission enforcement staff spoke with Kelley's attorney about the unpermitted development at the subject property and the possibility of resolving the matter administratively. Despite subsequent discussions on March 31, April 5, April 12, April 14, April 15, and April 18, 2005, staff was unable to reach a settlement in this matter.

4. Objection to Recordation of Notice of Violation and Statement of Defense

The CDO NOI stated:

If you object to the recordation of the Notice of Violation in this matter and wish to present evidence on the issue of whether a violation has occurred, you must respond in writing... no later than April 5, 2005.

Staff received a written objection to recordation of a Notice of Violation from Mr. Kelley on April 14, 2005. The objection was included in the cover letter submitted with the Statement of Defense pertaining to the revetment (**Exhibit 12**), as described below. This objection was timely, due to numerous extensions provided as a courtesy to Kelley.

In accordance with Sections 1318(a) and 13191(a) of the Commission's regulations, you have the opportunity to respond to the Commission staff's allegations as set forth in this [CDO NOI] by completing the enclosed Statement of Defense form. The Statement of Defense form must be returned to the Commission's San Francisco office... no later than April 5, 2005.

On March 28, 2005, Mr. Kelley requested more time to complete the Statement of Defense. Staff advised him that a written request and showing of good cause were required in order to receive an extension, in accordance with Section 13181(b) of the Commission's regulations. Staff received Kelley's written request for an extension on March 30, 2005, and agreed to extend the deadline for submittal of the Statement of Defense to April 8, 2005.⁵ As a further courtesy to Kelley, staff extended the deadline for submittal to April 13, 2005. An third extension for the portion of the Statement of Defense pertaining to the unpermitted development included in

⁵ All deadlines for submittal of a Statement of Defense also pertain to submittal of an objection to the recordation of a Notice of Violation. Mr. Kelley submitted an objection with his Statement of Defense on April 18, 2005. This objection was timely, as it was submitted by the final deadline.

Amendment A4 was granted pursuant to Section 13181(b) of the Commission's regulations, setting April 18, 2005 as the final deadline for submittal of that portion of the Statement of Defense. This last extension was granted in order to provide Kelley's attorney the opportunity to view archived documents pertaining to the CDP No. 5-88-794 and Kelley's previous amendment applications. The final deadline for the Statement of Defense pertaining to the revetment and grading of the beach remained April 13, 2005. Kelley's attorney submitted the Statement of Defense pertaining to the revetment and grading violations on April 14, 2005 (**See Exhibit 12**). Staff received the remaining portion of the Statement of Defense on April 18, 2005 (**Exhibit 13**). The defenses and staff's responses to those defenses are addressed below, in Section H.

C. Description of Unpermitted Development

Unpermitted development located on the subject property includes grading (cut and fill), importation of fill and construction of a fill slope, construction of an approximately 90-foot long rock revetment using mechanized equipment, a gate linking two segments of an approximately 6-foot high front yard wall, a path with stairs, a non-structural concrete slab, twenty below grade "soldier piles", and a soldier-pile wall.

D. Basis for Issuance of Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Coastal Act Section 30810, which states:

(a) If the commission, after public hearing, determines that any person...has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person ... to cease and desist.

(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

The Commission is authorized to issue CCC-05-CD-05 pursuant to both Section 30810(a)(1) and 30810(a)(2). Kelley's activities on the subject property constitute development as defined in Coastal Act Section 30106 and therefore required a Coastal Development Permit under Coastal Act Section 30600. Additionally, the development was undertaken in direct violation of the Special Conditions of CDP No. 5-88-794.

Mr. Kelley has applied to amend CDP No. 5-88-794, seeking after-the-fact authorization for the construction of the front yard wall, path with stairs, concrete slab, soldier piles, and soldier-pile wall. Should the Commission amend CDP No. 5-88-794 to grant after-the-fact authorization for any or all of this development, said development will no longer be unpermitted or in violation of

the permit. However, at the time of this report, the Commission has granted no such authorization. The proposed Order provides that Mr. Kelley must submit all materials required to complete amendment application No. 5-88-794-A4 within 30 days of the issuance of the Order. Neither this report nor the proposed Order will prejudice any forthcoming Commission hearing on application No. 5-88-794-A4.⁶ The Commission will evaluate the amendment application on the merits.

The construction of the revetment and grading of the beach constitute unpermitted development that is inconsistent with the policies of Chapter 3 of the Coastal Act. Although, a showing of Chapter 3 inconsistency is not required when seeking issuance a Cease and Desist Order, this information is provided below, as background.

1. Development Requiring a Coastal Development Permit Occurred at the Subject Property

Development is defined in Coastal Act Section 30106 as:

“Development” means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use... (emphasis added)

Placement or erection of the rock revetment, walls, stairs, soldier piles, concrete slab, and fill slope; importation of fill materials; and grading of the sandy beach seaward of the residence clearly constitute development under Section 30160.

Once development has been identified, Section 30600(a) provides:

(a) Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone... shall obtain a coastal development permit.

The development at the subject property requires a coastal development permit under Section 30600(a). Mr. Kelley did not obtain a coastal development permit prior to

⁶ A determination that the development included in Amendment A4 is unpermitted is uncontroversial and uncontested by any party to this matter, as Mr. Kelley seeks after-the-fact authorization for the development.

conducting the development. Although Mr. Kelley has submitted incomplete applications for after-the-fact approval for some of the unpermitted development, no application has proceeded to a Commission hearing for action by the Commission, and no coastal development permit has been issued granting authorization for any of the unpermitted development. Therefore, all of the cited development on the subject property constitutes unpermitted development. Section 30810(a)(1) authorizes the Commission to issue the proposed Cease and Desist Order to address this unpermitted development.

Resource damage caused by this unpermitted development includes increased erosion at the ends of the revetment and seaward of the revetment. In addition, the revetment may impact sand movement and sand supply in the surrounding area. Consequently, the proposed Order directs Mr. Kelley to remove the revetment in accordance with the terms and conditions of the Order and undertake restorative grading to return the sandy beach to the grade that existed prior to the cited unpermitted development activities.

2. Development is Inconsistent with Existing Coastal Development Permit No. 5-88-794

Coastal Act Section 30810(a)(2) authorizes the Commission to issue a cease and desist order if development is inconsistent with a previously-issued coastal development permit. The Commission issued CDP No. 5-88-794 on December 1, 1988. The permit and its conditions run with the land, binding Kelley, as a successor owner of the subject property. The following paragraphs explain the manner in which the unpermitted development is inconsistent with the special conditions of CDP No. 5-88-794.

a. Special Condition 7 – Future Improvements:

Prior to transmittal of the Coastal Development Permit the applicant shall provide a deed restriction for recording...which provides that Coastal Development Permit 5-88-794 is for the approved development only, and that any future additions or improvements to the property will require a Coastal Development Permit from the Coastal Commission or it's successor agency.

The document should note that no permanent improvements with the exception of one public path or stairway noted on the present plans shall be constructed within the geologic set back area or under the floors or seaward of the existing structures.

The deed restriction shall run with the land, binding all successors and assigns. ... It shall remain in effect for the life of the development approved in this permit.

Ms. Goldbaum recorded the deed restriction required under Special Condition 7 on December 12, 1989 (**Exhibit 14**). As with the offer to dedicate the vertical access easement discussed below, the deed restriction runs with the land and binds Kelley, as a successor owner. Mr. Kelley did not obtain additional coastal development permits for the cited development, in violation of Special Condition 7. As noted above, the deed restriction prohibits any permanent

improvements “seaward of the existing structures”. The revetment lies seaward of the existing residence that was authorized by CDP No. 5-88-794.

b. Special Condition 8 – No Beach Level Development:

Prior to issuance the applicant shall agree that this approval is based upon his assertions that no beach development, including leachfields or seawalls will be necessary to protect the development.

In the staff report prepared for CDP No. 5-88-794, the Commission raised concerns regarding the stability of the artificial bluff (what Commission staff refers to in this report as the “fill slope”) that was chosen as the location of the proposed development, citing potential exposure to wave action and susceptibility to erosion from storms such as the 1988 storm that caused an eight-foot rescission of the bluff at issue. The Commission stated that if the proposed development was not properly engineered to withstand wave action and storms, such a large parcel would require 200 feet of revetments to protect it (“the beach will be occupied entirely by the revetments”⁷). Accordingly, the Commission attached Special Condition 8 to the permit to specifically ensure that the proposed development would not require revetments and other shoreline protective devices. Special Condition 5 was also attached to the permit to ensure that the proposed development was specifically designed to withstand hazardous storm conditions.

Mr. Kelley asserts that the revetment was constructed in order to protect his residence from wave action generated during heavy storms. There is no evidence that the revetment was necessary since the residence was built on caissons. Moreover, Special Condition 8 required assurances that no protective structures would be needed to shield the residence from wave action. Mr. Kelley is bound by this condition.

c. Special Condition 3 - Vertical Access:

Prior to the transmittal of the permit...[t]he applicant shall execute and record a document...irrevocably offering to dedicate to a public agency or a private association approved by the Executive Director as easement for public access for pass and repass from Pacific Coast Highway to the shoreline.

The easement be described in metes and bounds and shall extend from the Pacific Coast Highway to the ordinary high tide of the Pacific Ocean, generally within the geological setback along the western property line. The easement shall not be less than 10 feet in width, and shall be sited and designed to accommodate reasonable and safe pedestrian access from the highway to the area along the beach dedicated in [Special] condition 2.

⁷ See *Staff Report*, prepared for CDP No. 5-88-794, dated 11/29/88, at page 23.

The easement shall enable a private or public agency accepting maintenance and liability to enter, improve and maintain the access in order to provide pedestrian access to the shoreline.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner.

The Goldbaums executed an offer to dedicate a vertical easement, as required under Special Condition 3, on July 11, 1989 and recorded it at the Los Angeles County Recorder's Office on December 12, 1989 (**Exhibit 15**). This easement was accepted by Access for All on September 23, 2004. A portion of the revetment lies within the vertical access easement, effectively blocking the bottom portion of the access. In addition, the front yard wall and path with stairs may also lie within the vertical access easement. This development is included in Kelley's Amendment A4 and will be addressed through a forthcoming permit action by the Commission.

3. Grading of the Beach and Construction of the Revetment are Inconsistent with Policies of Chapter 3 of the Coastal Act

The Commission may issue a Cease and Desist Order under Section 30810 of the Coastal Act solely based on a finding of unpermitted development on the subject property. Although a showing of inconsistency with Chapter 3 of the Coastal Act is not required under Section 30810, this discussion is provided for background.

a. Section 30235 – Construction Altering Natural Shoreline

Section 30235 states in relevant part:

Revetments, ... and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline supply.

The revetment neither serves a coastal dependent use, nor protects existing structures or public beaches from erosion. In fact, the scouring effects of the revetment will actually increase beach erosion seaward of the revetment and at either end of the revetment. The revetment was not designed to eliminate or mitigate adverse impacts on local shoreline supply. Mechanized equipment was used to grade the beach and bury the lower portion of the revetment in the sand to an undetermined depth. Thus, the revetment is a static structure placed within a dynamic environment and will most likely have adverse impacts on sand movement and supply, in violation of Coastal Act Section 30235. Moreover, there is no evidence that the revetment is necessary to protect the residence, which is built on an engineered caisson grade-beam foundation.

b. Section 30251 – Scenic and Visual Qualities

Section 30251 states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural landforms....

Grading the beach and construction of the artificial fill slope altered the beach in front of the subject property. The continued presence of the revetment may increase beach erosion and may impede the natural sand movement and supply, continually altering the beach. Furthermore, movement of rocks making up the revetment may litter the public beach that extends from the mean high tide line to the ocean and create obstacles that the public must walk around, thereby decreasing the public's enjoyment of the beach.

d. Section 30253 – Minimization of Adverse Impacts, Assure Stability and Structural Integrity

Section 30253 states:

New Development shall:

...

2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Grading of the beach and construction of the revetment are inconsistent with Section 30253 for the same reasons discussed above with regards to Section 30235: the development increases erosion and impedes natural movement of sand on the beach in front of the subject property and in surrounding areas. The revetment may cause accelerated erosion of surrounding properties, which would lead neighboring property owners to construct seawalls or revetments.

4. Provisions of CCC-05-CD-05

Mechanized equipment was used to dig a trench on the beach and to bury rocks in the trench to an unknown depth. In an effort to adequately address the potential impacts to the beach and ocean from removal of the revetment, the Executive Director issued ED-05-CD-02 and directed Mr. Kelley to cease and desist all unpermitted development and to cooperate with the Commission to get the appropriate authorization to remove the revetment. Issuance of CCC-05-CD-05 will ensure appropriate removal of the revetment and restoration of the site.

CCC-05-CD-05 requires the submittal of a removal plan, for approval by the Executive Director, before removal can commence. The plan must include provisions that regulate the use of mechanized equipment, provide a contingency plan for potential release of toxic substances from the equipment, address water quality issues, establish a location for the removed materials, and

address the potential removal and disposal of liners and other unknown materials from the trench. The plan will ensure that removal is conducted in a manner that avoids excessive noise and interference with public recreation, as required by Coastal Act Sections 30210, 30211, and 30251, restores the natural contours of the beach, as required by Sections 30251, and avoids introduction of pollutants into the ocean, as required by Sections 30230 and 30231. The purpose of the removal plan is to protect natural resources and to ensure that removal and restoration activities are conducted in conformity with the policies of Chapter 3 of the Coastal Act.

E. Basis for Recordation of Notice of Violation

1. A Violation of the Coastal Act Has Occurred

The cited development, described in Section C above, constitutes development as defined in Coastal Act Section 30106. This development requires a CDP pursuant to Coastal Act Section 30600. Mr. Kelley did not obtain a CDP to authorize any of the cited development. Therefore, the cited development constitutes unpermitted development, in violation of the Coastal Act.

2. All Existing Administrative Methods of Resolving the Violation Have Been Exhausted and Mr. Kelley Has Been Made Aware of the Potential for Recordation

Coastal Act Section 30812(g) provides:

(g) The executive director may not invoke the procedures of this section until all existing administrative methods for resolving the violation have been utilized and the property owner has been made aware of the potential for the recordation of a notice of violation. For purposes of this subdivision, existing methods for resolving the violation do not include the commencement of an administrative or judicial proceeding.

The Executive Director notified Mr. Kelley of the potential for recordation of a Notice of Violation in this matter on March 15, 2005. Additionally, staff informed Mr. Kelley on numerous occasions that he had the opportunity to submit a written objection to the recordation and to request a hearing on the issue of whether a violation occurred. Mr. Kelley was therefore made aware of the potential for recordation of a Notice of Violation, as required under Section 30812(g). Mr. Kelley has confirmed this by submitting a written objection to the recordation of a Notice of Violation. Mr. Kelley has been notified that the hearing on this matter will accompany the hearing regarding CCC-05-CD-05, at the May Commission hearing.

As outlined in Section B.3 above, staff made repeated attempts to resolve this matter administratively. Unfortunately, these attempts were unsuccessful. Staff concludes that all existing administrative methods for resolving the violation have been utilized, as required under Section 30812(g).

3. Rescission of the Notice of Violation

After the recordation of the Notice of Violation, if Mr. Kelley resolves the violation and removes the unpermitted development from the subject property in accordance with the terms and conditions of CCC-05-CD-05, the Commission shall record a notice of rescission of the Notice of Violation pursuant to Section 30812(f).

F. California Environmental Quality Act (CEQA)

The Commission finds that the issuance of CCC-05-CD-05 to compel compliance with the Coastal Act and to remove unpermitted development is exempt from any applicable requirements of the California Environmental Quality Act of 1970 (CEQA) and will not have any significant adverse effects on the environment, within the meaning of CEQA. The Order is exempt from the requirements for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2), 15061(b)(2), 15037, 15038, and 15321 of the CEQA Guidelines.

G. Findings of Fact

1. Bert Kelley is the owner of property located at 26530 Latigo Shore Drive in Malibu, Los Angeles County.
2. Mr. Kelley undertook activities on the subject property that constitute development as defined in Coastal Act Section 30106.
3. Mr. Kelley undertook this development without obtaining a CDP. No permit exemption applies to these actions.
4. The unpermitted development is inconsistent with the terms and conditions of CDP No. 5-88-794.
5. Substantial evidence, as that term is used in Coastal Act Section 30812, exists that a Coastal Act violation has occurred.
6. The Executive Director has made Mr. Kelley aware of his intent to record a Notice of Violation pursuant to Coastal Act Section 30812. Mr. Kelley has submitted a written objection to such recordation.
7. On March 3, 2005, Commission staff confirmed that mechanized equipment was used to grade the beach and to construct an approximately 90-foot long rock revetment on the sandy beach seaward of Mr. Kelley's residence.
8. Mr. Kelley did not obtain an emergency permit to grade the beach and construct the revetment from the Commission or the City of Malibu.
9. A 10-foot wide vertical access easement extends along the western boundary of Mr. Kelley's property from Latigo Shore Drive to the sandy beach below Mr. Kelley's residence. Mr. Kelley

constructed a rock revetment, the westernmost portion of which extends across the entire seaward boundary of the vertical access easement.

10. On March 4, 2005, the Executive Director issued a Notice of Intent to Issue an Executive Cease and Desist Order ("EDCDO NOI"). Mr. Kelley did not respond to the EDCDO NOI in a "satisfactory manner" as required by Coastal Act Section 30809(b) and as defined by Section 13180(a) of the Commission's regulations.

11. The Executive Director issued an Executive Cease and Desist Order ("EDCDO") on March 4, 2005, requiring Mr. Kelley to immediately cease from conducting or maintaining further unpermitted development activity on the subject property and to immediately contact the Commission to discuss removal of the revetment and site restoration.

12. Commission staff advised Mr. Kelley on March 7, 2005 that a Commission-approved cease and desist order was necessary to ensure appropriate removal of the revetment and site restoration.

13. On March 15, 2005, the Executive Director issued a Notice of Intent to Record a Notice of Violation and to Commence Cease and Desist Order and Restoration Order Proceedings ("CDO NOI"), addressing grading of the beach (cut and fill), importation of fill and construction of a fill slope, construction of a rock revetment, a front-yard wall, a path with stairs, a non-structural concrete slab, twenty below grade "soldier piles", and a wall located on top of the soldier piles.

14. On August 19, 1999, Mr. Kelley applied to amend the existing CDP No. 5-88-794, seeking after-the-fact authorization for the following development: relocation of the residence ten feet seaward, extension of the building pad and repair of the artificial fill slope, addition of sod to the top of the fill slope, installation of twenty soldier piles, and construction of a soldier pile wall, a front yard wall, a non-structural slab, and caisson framing. As of the date of this report, the permit application remains incomplete and the development remains unpermitted.

15. All of the unpermitted development listed in the CDO NOI and addressed in this report remains on Mr. Kelley's property.

16. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order after holding a public hearing.

H. Violator's Defenses and Commission Staff's Response

Mr. Kelley submitted a Statement of Defense ("SOD"), pertaining solely to construction of the revetment and grading of the beach, on April 15, 2005. Commission staff received an additional SOD from Kelley, addressing the remaining unpermitted development, on April 18, 2005. The following paragraphs present statements made by Mr. Kelley and the Commission staff's response to those statements.

1. Kelley's Defense:

The "revetment" referenced in the NOI is a temporary emergency placement of rock and soil that was put in place to address conditions that resulted from the extreme storm events that occurred prior to and around the time of its construction.

Response:

A revetment is a facing of stone, rock, or concrete supported on and built to protect a scarp, embankment, or shore structure against wave action or currents.⁸ According to this definition, the “placement of rock and soil... to address... extreme storm events” described in the above statement constitutes a revetment. Regardless of the word or phrase used to describe the work undertaken on the subject property, the work constitutes unpermitted development under the Coastal Act. The Commission has the authority, under Coastal Act Section 30810, to issue a cease and desist order if development, including placement of solid materials, occurred without a CDP.

Staff presumes that the “soil” mentioned in the above statement was removed from the fill slope through unpermitted grading and used to backfill the revetment. If the soil was imported solely for use in the revetment, any such unpermitted importation also constitutes a Coastal Act violation.

Photographs from an anonymous source show mechanized equipment on the beach digging trenches and placing rocks in the trenches. This work does not appear temporary in nature, and most likely the use of mechanized equipment will be required to remove the rocks. Even if the revetment was intended as a temporary emergency measure, which it does not appear to be, Mr. Kelley did not follow the applicable procedures for obtaining an emergency permit for such development. These procedures are outlined below in Commission staff's response to Kelley's defense #3.

2. Kelley's Defense:

The work was performed by Mike Cheap, a friend of Mr. Kelley's, a contractor...who Mr. Kelley asked to check on the Property. Mr. Cheap was not involved in the construction of the residence on the Property and is not familiar with all of its structural features. During this time Mr. Kelley and Mr. Cheap were not able to be in regular contact and Mr. Kelley was not able to advise Mr. Cheap about the work he was performing.

Mr. Kelley learned about what Mr. Cheap installed after the fact.

Response:

⁸ California Coastal Commission, *Beach Erosion and Response Guidance Document*, December 1999.

Mr. Kelley is the owner of record of the subject property and is bound by CDP No. 5-88-794 and the documents recorded in accordance with the permit. It was the responsibility of Kelley, not Mr. Cheap, to ensure that CDPs were obtained for any new development on the subject property, and that the development was conducted in conformity with the existing CDP and the conditions pertaining thereto. Mr. Kelley asserts that he only told Mr. Cheap to "check on the property". If there is a dispute between Mr. Kelley and Mr. Cheap about what Mr. Cheap was authorized to do, Mr. Kelley may have legal recourse against Mr. Cheap. However, that does not provide Mr. Kelley with a defense to issuance of a cease and desist order that requires removal of the unpermitted development.⁹ Regardless of who conducted the unpermitted development activities, Mr. Kelley is accountable because the work occurred on his property on his behalf. The Coastal Act does not exempt unpermitted development activities simply because a friend conducted the activities for the property owner.

3. Kelley's Defense:

Mr. Cheap initially called the Coastal Commission's Ventura office to find out what he would have to do to prevent further damage and loss of the stairway. He spoke to Steve Hudson, who informed him that he would have to contact the City of Malibu for an emergency permit. Mr. Cheap then spoke with Craig George at the City of Malibu. Mr. George told Mr. Cheap to take actions necessary to protect life and property and come in afterwards for an emergency permit. These conversations, while initiated out of concern for the stairway, were very general in nature. Mr. Cheap understood that he was being told what the procedure was in emergency situations in general.

Following these conversations, Mr. Cheap began to observe a dramatic loss of sand below the Property. In a very short period, Mr. Cheap observed that over 20 feet of beach adjacent to the property had eroded away, exposing house foundations on the Property. More storms were coming, Mr. Cheap was concerned that the erosion could reach a point where the septic system on the Property might fail. There was a 12-foot high unstable and rain saturated cliff resulting from the erosion that appeared poised to fail in the coming storms. Mr. Cheap was concerned that people on the beach passing near the cliff could be injured if the cliff had failed.

Based on the conversations that he had had with Mr. Hudson to contact the City of Malibu and the conversation that he had with Mr. George to protect life and property first and then apply for an emergency permit, Mr. Cheap proceeded in what he believed was the appropriate emergency course of action.

Response:

Mr. Hudson is familiar with Mr. Kelley and the subject property, having worked on previous enforcement and permitting matters involving the subject property. In addition, Mr. Hudson

⁹ In general, contractors performing this type of work would not undertake the work without the property owner's prior approval, and knowledge that he would receive compensation.

worked on Kelley's previous permit amendment applications and is personally aware of the fact that the Commission has permit jurisdiction over the property due to the existing CDP. He is also aware that the permit conditions prohibit construction seaward of the residence. Mr. Hudson did not speak with Mr. Cheap regarding any development on Mr. Kelley's property, including constructing shoreline protection on the subject property. However, in an apparent unrelated matter, Mr. Hudson was contacted by a man who claimed to represent a Homeowner's Association along this portion of Latigo Shores Drive, regarding the unpermitted closure of the exiting public access stairway located approximately 300 ft. downcoast of the Kelly property. Mr. Hudson informed the caller that, closure of the public accessway constituted a Coastal Act violation and that, in addition to any required coastal development permit or emergency permit from the City of Malibu repair of the stairs, a coastal development permit, permit amendment and/or emergency permit would also be required from the California Coastal Commission.

With regards to Mr. George, the statement above indicates that "Mr. Cheap understood that he was being told what the procedure was in emergency situations in general." Even if Mr. George made the alleged statements, obtaining oral advice regarding "emergency situations in general" did not provide Mr. Kelley or Mr. Cheap with the authorization required to conduct emergency development activity at the subject property. Mr. Kelley did not follow the procedures for undertaking such development and did not obtain an emergency permit from the Commission or the City of Malibu.

Coastal Act Section 30624 authorizes the Executive Director to issue emergency permits, in accordance with the procedures and criteria set forth in Section 13136 et seq. of the Commission's regulations. Section 13138 requires the submittal of applications for emergency permits to the Executive Director by letter or facsimile, and by telephone or in person if time does not allow a written application. Mr. Kelley did not submit an emergency permit application by mail or facsimile, did not contact staff by telephone, and did not appear in person to apply for an emergency permit.

Even assuming that Mr. Kelley could have alternatively obtained an emergency permit for the development from the City of Malibu, no such permit was applied for or obtained. The procedures for obtaining a permit from the City of Malibu are set forth in Section 13329 et seq. of the Commission's regulations and in Section 13.14 of the Malibu Local Coastal Program Implementation Plan ("Malibu LCP IP"). Section 13329.1 requires the submittal of applications for emergency permits by mail or facsimile. Alternatively, applications may be made over the telephone or in person, if time does not allow for a written submittal.

Section 13.14 of the Malibu LCP IP states that applications for emergency permits must be submitted, by any of the means described in Section 13329.1, to the Planning Director (**Exhibit 16**). To issue an emergency permit, the Director must find that an emergency exists, as defined in Chapter 2.1 of the Malibu LCP IP as: "a sudden unexpected occurrence, demanding immediate action to prevent or mitigate loss or damage to life, health, property or essential public services"¹⁰.

¹⁰ See *City of Malibu Local Coastal Program, Local Implementation Plan*, dated September 13, 2002, at page 10.

Mr. Kelley did not submit an application and did not obtain a permit from the City of Malibu. Furthermore, an emergency did not exist as defined in the Malibu LCP IP, due to the fact that the residence was built to withstand severe storms.

4. Kelley's Defense:

Mr. Cheap initially attempted to stop the erosion with sandbags and plastics, which quickly failed. Mr. Cheap then decided that [sic] put in a temporary system of rocks to prevent further erosion and stabilize the cliff.... The whole system was temporary. Mr. Cheap intended to remove the rocks when the storms ended.

Response:

As stated above (see Commission staff's response to statement #1), the revetment does not appear to be a temporary structure. Even if the revetment was intended to be a temporary structure, it requires an emergency permit, and Mr. Kelley did not follow the procedures to obtain an emergency permit from the Commission or even from the City of Malibu (as outlined in Commission staff's response to statement #3). Moreover, the revetment is inconsistent with CDP No. 5-88-794, as explained above.

5. Kelley's Defense:

Contrary to the NOI, Mr. Cheap did not remove sand from the beach or from the adjacent land when he installed the temporary measures, nor did he attempt to "bury" the rocks. Rather he placed the rocks at the base of the cliff. After placing the rocks, the cliff was trimmed down to assure stability, with the dirt from this overhang falling onto the rocks. There was no attempt to "bury" the system.

Response:

Information provided to staff from an anonymous source stated that a bulldozer was excavating sand from the beach in front of the subject property, and that rocks were placed in the resulting trenches. Photographs taken during staff's March 3, 2005 site visit confirm this general observance. If dirt from the existing fill slope "fell" onto the rock revetment as Mr. Kelley asserts, this would have only occurred as a result of grading the trench. More importantly, whether the fill materials "fell" or were used to back-fill behind the revetment, grading of the fill slope and placement of fill materials (including the rocks) on the beach constitutes development that was conducted without a coastal development permit. CCC-05-CD-05 directs Mr. Kelley to remove the entire revetment, regardless of how it was constructed.

6. Kelley's Defense:

Mr. Kelley denies that he failed to respond satisfactorily to the Commission's March 4, 2005 notice. Mr. Kelley did not receive the notice until the evening of March 4. He immediately contacted legal counsel, who informed Commission staff on Monday March 7 that no work was occurring or would occur on the property.

Response:

The EDCDO Notice of Intent and ED-05-CD-01 itself were both hand delivered to the residence of Mr. Kelley, in full compliance with the Coastal Act and the Commission's regulations.

Coastal Act Section 30809(b) states:

(b) The cease and desist order shall be issued only if the person or agency has failed to respond in a satisfactory manner to ... a written notice given by certified mail or hand-delivered to the landowner or person performing that activity.

Since Commission staff was concerned that further unpermitted development would occur on the subject property over the weekend of March 5-6, 2005, in an attempt to provide notice as quickly as possible, the notice was hand delivered to the Mr. Kelley residence. In an effort to stop any continuing development activity as quickly as possible, a 5:00 pm March 4, 2005 deadline was established for Mr. Kelley to respond to the EDCDO NOI. Mr. Kelley states that he received the EDCDO NOI and EDCDO in the evening of March 4, 2005, yet no response was made on that date. He did not provide any information to Commission staff in response to either document until March 7, 2005.

It should also be noted that whether or not an EDCDO, which is only effective for 90 days, was validly executed is wholly irrelevant to the issuance of CCC-05-CD-05 by the Commission.¹¹

7. Kelley's Defense:

Mr. Kelley denies that the temporary system is a violation of the CDP, the Coastal Act as implemented through the Local Coastal Program for the City of Malibu, or the practices and procedures of the Commission or the City of Malibu for addressing emergency situations.

Response:

As stated in the response of Commission staff to statement #1, the revetment does not appear to be a temporary structure, given the method with which it was constructed. Even if the revetment

¹¹ We note that there have been no concerns raised re: the Notice of Intent to Record a Notice of Violation and to Commence Cease and Desist Order and Restoration Order Proceedings, and that Mr. Kelley has responded to the notices by submitting a Statement of Defense.

were intended to be “temporary”, it constitutes development under the Coastal Act and requires the appropriate authorization.

Moreover, as explained above in Sections D.2 and D.3, grading the beach and constructing the revetment violated CDP No. 5-88-794 and is inconsistent with numerous Chapter 3 policies of the Coastal Act. These policies are incorporated into the Malibu Local Coastal Plan.

Grading the beach and constructing the revetment violated the Coastal Act because the work constituted unpermitted development that is not exempt from permitting requirements of the Coastal Act.

Mr. Kelley did not follow the procedures for obtaining an emergency permit from the Commission or the City of Malibu, as stated in the Commission’s response to Statement # 3 above. As explained above, no emergency permit was applied for or issued for the construction of the revetment and grading of the beach.

8. Kelley’s Defense:

The NOI concerns facts and events that predate Mr. Kelley’s involvement with the Property.

Mr. Kelley purchased the Property in 1997, after construction of the residence had already been completed, and was not a party to the 1988 Coastal Development Permit (“CDP”) No. 5-88-794 Application.

Response:

The NOI addresses the unpermitted development that has occurred and remains on the subject property in violation of the conditions of existing permits, which apply to Mr. Kelley’s property, and the Coastal Act. Regardless of whether Mr. Kelley undertook this development activity, as owner of the property, he is responsible for resolving the violation.

Both the “benefits” and the “burdens” of CDP No. 5-88-794 run with the land and bind Mr. Kelley as a successor owner. In addition, recorded deed restrictions pertaining to future development and the potential for “extraordinary erosion” were in the chain of title when Mr. Kelley purchased the property in 1997.

9. Kelley’s Defense:

The Commission did not inform Mr. Kelley that it intended to pursue a cease and desist order with respect to the matters that have been the subject of his CDP until he received the March 15, 2005 NOI. Mr. Kelley has informed the Commission that he does not have the information to respond to all of the allegations and present an informed and adequate defense.

On March 22, 2005 Mr. Kelley requested the complete Coastal Development Permit file for the Property from the Coastal Commission's Ventura Office...[d]espite repeated requests for the file, only a portion of that file has been produced to Mr. Kelley to date. There is other information that Mr. Kelley has been seeking to obtain that he has not been able to secure in the extremely limited time frame the Commission has afforded Mr. Kelley to respond.

Response:

The Executive Director informed Mr. Kelley of its intent to pursue a cease and desist order by sending a Notice of Intent to Kelley, in accordance with Section 13181(a) of the Commission's regulations. Mr. Kelley was provided 20 days to submit a Statement of Defense, which is the standard time period stated in Section 13181(a). The original deadline for Kelley's submittal of a Statement of Defense was April 5, 2005. As a courtesy to Kelley, the Executive Director extended this deadline, pursuant to the authority provided in Section 13181(b) of the Commission's regulations, until April 13, 2005 for the portion of the Statement of Defense pertaining to the revetment and until April 18, 2005 for the remaining portion. Ultimately, Mr. Kelley was provided 28 days to complete his first submittal, as described above, and 33 days to complete his subsequent submittal, both of which are in excess of time required by the Commission's regulations.

Mr. Kelley has applied to amend CDP No. 5-88-794 on three separate occasions and is familiar with the development at the site and the permit. His current amendment application, A4, requests after-the-fact authorization for the unpermitted development listed in the NOI with the exception of the revetment. An applicant who seeks after-the-fact approval for unpermitted development generally obtains the information necessary to support the claim. Furthermore, the fact that Mr. Kelley is applying for after-the-fact approval of the unpermitted development is a clear indication that no CDP has been issued for the development. The Commission need only find that development occurred without a permit to issue a cease and desist order under Coastal Act Section 30810.

10. Kelley's Defense:

Mr. Kelley further objects to the inclusion of the "front yard wall" located on APN 4460-019-025, in the NOI relating to 26530 Latigo Shore Drive ("Property"). The two are separate properties and any alleged violations on that property should not be tied to the Property.

The "front yard wall" is not located on the Property and was not properly the subject of the NOI. At staff's request, Mr. Kelley included this wall in ...Application A4.

Response:

The NOI and these Orders pertain only to the front yard wall or portion thereof located on Kelley's property. Photographs of Kelley's property clearly show a wall extending across the

northern boundary of the property, in front of the western portion of the residence. Mr. Kelley has provided no evidence to support his claim that the wall is not located on his property.

11. Kelley's Defense:

Approval for the vertical boundary wall was recommended in the Staff Report for Application A2.

Response:

Mr. Kelley withdrew Application A2 before it was heard by the Commission at the April 1999 Commission hearing. The staff report was not submitted to the Commission and no Commission action was taken on it and, therefore, is irrelevant to these Orders. The vertical boundary wall is included in Kelley's current amendment application, A4. A new staff report will be prepared for A4, if and when this matter comes before the Commission for a hearing.

12. Kelley's Defense:

Mr. Kelley is informed and believes that the soldier pile design was reviewed and approved by the Commission staff in 1990.

Response:

Mr. Kelley has submitted no evidence in support of this statement. Had the Commission approved the soldier pile design in a permit context, a CDP would have been issued for its construction. No CDP has been issued authorizing the soldier piles.

13. Kelley's Defense:

At one time there was a fill slope that was present when [Kelley] purchased the property.

The remaining dirt seaward of the property is part of the original Caltrans fill, which existed prior to the CDP and was acknowledged therein.

Response:

Mr. Kelley has submitted no evidence in support either of these statements. Regardless of whether the fill was imported and placed seaward of the property by a prior owner without a CDP, Mr. Kelley is responsible for resolving the violation, as the owner of the property. CCC-05-CD-05 addresses submittal of evidence pertaining to the origin of the fill. Mr. Kelley proposes grading the slope, regardless of its origin. The grading will constitute development and will be addressed in Application A4 and in accordance with the terms of CCC-05-CD-05.

14. Kelley's Defense:

The Los Angeles County Fire Department required the staircase as a pre-condition to issuance of the certificate of occupancy for the residence.

Mr. Kelley believes that the stairs are not a violation as they were part of the final plans for the Property approved by the County and follow the pattern for the vertical access the Commission approved in the CDP.

Response:

Coastal Act Section 30600 states in relevant part:

[I]n addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person... wishing to perform or undertake any development in the coastal zone...shall obtain a coastal development permit.

Even if required by the Los Angeles County Fire Department or approved by another department of the County under their codes and regulations, the stairs constitute development under the Coastal Act and require a CDP. Moreover, the stairs do not follow the pattern for vertical access addressed in the permit as approved by the Commission, and in fact, are not used for public access at all. The stairs appear to lead from the western edge of the residence, in the middle of the subject property, to the northern boundary of the property, presumably the driveway. The vertical access easement extends along the entire western boundary of the property, from Latigo Shore Drive to the sandy beach below the residence.

Staff recommends that the Commission issue the following Cease and Desist Order:

CEASE AND DESIST ORDER CCC-05-CD-05, KELLEY

Pursuant to its authority under Public Resource Code Section 30810, the California Coastal Commission hereby orders and authorizes Bert Kelley (hereinafter referred to as “Respondent”) to:

1. Cease and desist from engaging in any further development on the subject property not authorized by a coastal development permit.
2. Cease and Desist from maintaining unpermitted development on the subject property, consisting of grading (cut and fill), importation of fill and construction of a fill slope, construction of an approximately 90-foot long rock revetment, a 6-foot high front yard wall, a path with stairs, a non-structural concrete slab, twenty soldier piles, and a wall built on top of the soldier piles in accordance with the terms of this Order.
3. Cease and desist from engaging in any further development that violates Coastal Development Permit No. 5-88-794.

4. Regarding the Grading of the Beach and Construction of the Rock Revetment:

A. Within 20 days of the issuance of this Order, Respondent shall submit a plan to the Executive Director for approval to remove the rock revetment described in Section 4 of this Order and restore the site to its pre-violation condition.

The removal plan should provide for:

- a. Restorative grading of the sandy beach;
- b. Appropriate operation of mechanized equipment necessary to complete removal and restoration work, including but not limited to the following:
 - i. hours of operation of mechanized equipment
 - ii. contingency plan in case of a spill of fuel or other hazardous release from use of mechanized equipment that addresses clean-up and disposal of the hazardous materials and water quality concerns;
- c. Removal and disposal of revetment liner materials, should such materials be found during removal of the revetment;
- d. Disposal of revetment and fill materials;
- e. Protection of water quality.

If the Executive Director determines that any modifications or additions to the submitted plan are necessary, he shall notify the Respondent. The Respondent shall complete requested modifications and resubmit the plan for approval within 10 days of the notification.

B. Within 10 days of the approval of said plan by the Executive Director, Respondent shall complete removal of the rock revetment and restoration of disturbed areas of the subject property, in accordance with the approved plan and this Order.

C. Within 10 days of completing the removal of the rock revetment and restoration of disturbed areas of the subject property, in accordance with the approved plan and this Order, Respondent shall submit photographic evidence of the completion of the work required under this section to the attention of Christine Chestnut in the Commission's San Francisco office.

5. Regarding the Installation of Soldier Piles; Importation of Fill; and Construction of the Fill Slope, Front Yard Wall, Wall Built on Top of the Soldier Piles, Path with Stairs, and Concrete Slab:

A. Within 20 days of the issuance of this Order, Respondent shall submit any evidence, including but not limited to geological survey reports and soil analysis, regarding the origin of the fill materials currently comprising the fill slope seaward of the residence located on the subject property. If after this 20-day period, the Executive Director determines that the evidence does not rebut the conclusion that Mr. Kelley imported fill materials and constructed the existing fill slope, the fill slope will be subject to removal under this Order.

B. Within 20 days of the issuance of this Order, Respondent shall submit plans for removal of all unpermitted development on the subject property.

C. Alternatively, if Respondent has, within 20 days of the issuance of this Order, completed Amendment Application 5-88-794-A4 according to the materials requested by Commission permit staff, Sections C and D will apply in lieu of Section B.

D. Within 20 days after the Commission acts on Amendment Application No. 5-88-794-A4, Respondent shall submit plans for removal of all unpermitted development including a schedule for all actions required, as described in this Order, that has not been approved in that action.

If the Executive Director determines that any modifications or additions to the plans are necessary, he shall notify Respondent. Respondent shall complete requested modifications and resubmit the plans for approval within 10 days of the notification.

E. Within 20 days of the approval of said plan by the Executive Director, Respondent shall complete removal of all unpermitted development, in accordance with the approved plan and this Order.

F. Within 10 days of completing the removal of all unpermitted development, as described in this Order, in accordance with the approved plan and this Order, Respondent shall submit photographic documentation of the completion of the work required under this section to the attention of Christine Chestnut in the Commission's Headquarters office.

F. All materials submitted pursuant to this Order must be made to Christine Chestnut at the following address:

California Coastal Commission
Attn: Christine Chestnut
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
Facsimile: (415) 904-5400

With a copy submitted to:
California Coastal Commission
South Central Coast District Office
Attn: Pat Veasart
89 S. California Street, Suite 200
Ventura, CA 93001-2810
Facsimile: (805) 641-1732

I. Persons Subject to the Order

Persons subject to this Cease and Desist Order are Mr. Kelley, his agents, contractors and employees, and any persons acting in concert with any of the foregoing.

II. Identification of the Property

The property that is subject this Order is described as follows:

A .29-acre parcel located between Latigo Shore Drive and the mean high tide line of the Pacific Ocean, containing an artificial bluff composed of fill materials and an approximately 90-foot long stretch of sandy beach. The property is located at 26530 Latigo Shore Drive (APN 4460-019-143).

III. Description of Unpermitted Development

Unpermitted development located on the subject property includes of grading (cut and fill), importation of fill and construction of a fill slope, construction of an approximately 90-foot long rock revetment, an approximately 6-foot high front yard wall, a path with stairs, a non-structural concrete slab, twenty below-grade "soldier piles", and a soldier pile wall of varying heights. In addition, the mechanized equipment was used to construct of the rock revetment on the beach below the residence.

IV. Effective Date and Terms of the Order

The effective date of the Order is the date of approval by the Commission. The Order shall remain in effect permanently unless and until modified or rescinded by the Commission.

V. Findings

The Order is issued on the basis of the findings adopted by the Commission at the May 2005 hearing, as set forth in the attached document entitled “Staff Report and Findings for Notice of Violation and Cease and Desist Order.

VI. Compliance Obligation

Strict compliance with the Order by all parties subject thereto is required. Failure to comply strictly with any term or condition of the Order including any deadline contained in the Order will constitute a violation of this Order and may result in the imposition of civil penalties of up to SIX THOUSAND DOLLARS (\$6,000) per day for each day in which such compliance failure, in addition to any other penalties authorized under Section 30820.

VII. Deadlines

The Executive Director may impose deadlines for good cause. Any extension request must be made in writing to the Executive Director and received by Commission staff at least ten days prior to expiration of the subject deadline.

VIII. Appeal

Pursuant to Public Resources Code Section 30803(b), any person or entity against whom the order is issued may file a petition with the Superior Court for a stay of this order.

IX. Government Liability

The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by Mr. Kelley in carrying out activities required and authorized under this Cease and Desist Order, nor shall the State of California be held as a party to any contract entered into by Mr. Kelley or his agents in carrying out activities pursuant to this Order.

X. Successors and Assigns

This Cease and Desist Order shall run with the land, binding all successors in interest, future owners of the Subject Property, heirs and assigns of Mr. Kelley. Notice shall be provided to all successors, heirs and assigns of any remaining obligations under this Order.

XI. No Limitation on Authority

Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission’s enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Cease and Desist Order.

CCC-05-NOV-03 & CCC-05-CD-05

Kelley

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Executed in _____ on _____, on behalf
of the California Coastal Commission.

By: _____ Peter Douglas, Executive Director

RECORDING REQUESTED BY:

California Coastal Commission

WHEN RECORDED MAIL TO:

California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
Attention: Christine Chestnut

[Exempt from recording fee pursuant to Gov. Code § 27383]

DOCUMENT TITLE:

NOTICE OF VIOLATION OF THE COASTAL ACT

Re: Assessor's Parcel No. 4460-019-143

Property Owners:

Bert Kelley

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

CALIFORNIA COASTAL COMMISSION
Attention: Christine Chestnut
45 FREMONT STRET, SUITE 2000
SAN FRANCISCO, CA 94105-2219

STATE OF CALIFORNIA OFFICIAL BUSINESS
Document entitled to free recordation
Pursuant to Government Code §27383

NOTICE OF VIOLATION OF THE COASTAL ACT
(Public Resources Code Section §30812)

I, Peter Douglas, declare:

1. I am the Executive Director of the California Coastal Commission.
2. A violation of the California Coastal Act of 1976 (Public Resources Code §3000, et seq.) has occurred on a certain parcel situated in Los Angeles County, California, more particularly described as follows:

One .29-acre parcel located at 26530 Latigo Shore Drive, Malibu, CA 90265 in Los Angeles County (Assessor's Parcel Number 4460-019-143)

Owner of Record: Bert Kelley

The Violation consists of the undertaking of development activity without the authorization required by the California Coastal Act of 1976.

3. This property is located within the Coastal Zone as that term is defined in Coastal Act Section 30103.
4. The record owner of said real property is: Mr. Bert Kelley.
5. The violation of the Coastal Act (Violation File No. V-4-02-032) consists of the following unpermitted development: grading (cut and fill), importation of fill and construction of a fill slope, construction of an approximately 90-foot long rock revetment, a gate linking two segments of an approximately 6-foot high front yard wall, a path with stairs, a non-structural concrete slab, twenty below grade "soldier piles", and a soldier-pile wall.

The requirements set forth in Section 30812 for notice and recordation of this Notice Of Violation have been complied with. Recording this notice is authorized under Section 30812 of the California Public Resources Code.

7. The California Coastal Commission notified the record owner, Mr. Bert Kelley, of its intent to record a Notice of Violation in this matter in a letter dated March 15, 2005.
8. The Commission received a written objection to the recordation of the Notice of Violation on April 18, 2005 and conducted a public hearing. The Commission determined that the unpermitted development on Mr. Kelley's property constituted a violation of the Coastal Act. Therefore, the Executive Director is recording the Notice of Violation as provided for under Section 30812 of the California Coastal Act.

Executed in _____, California, on _____.

I declare under penalty of perjury that the foregoing is true and correct.

PETER DOUGLAS, Executive Director

STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

On this _____ day of _____, in the year _____, before me the undersigned Notary Public, personally appeared Peter Douglas, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person who executed this instrument as Executive Director of the California Coastal Commission and acknowledged to me that the California Coastal Commission executed it.

Notary Public in and for Said State and County

CCC-05-NOV-03 and CCC-05-CD-05

Exhibit List

**Exhibit
Number**

Description

1. Site Map and Location.
2. Coastal Development Permit No. 5-88-794.
3. Amendment application No. 5-88-794-A4.
4. September 17, 1999 letter to Kelley, informing Kelley of the incomplete status of amendment application 5-88-794-A2.
5. January 20, 2000 letter to Kelley, informing Kelley of the incomplete status of amendment application 5-88-794-A2.
6. July 21, 2000 letter to Kelley, informing Kelley of the incomplete status of amendment application 5-88-794-A2.
7. Photographs from anonymous source, submitted to staff on March 3, 2005.
8. Photographs taken by staff during site visit on March 3, 2005.
9. EDCDO NOI with declaration of service, issued on March 4, 2005.
10. EDCDO, issued on March 4, 2005.
11. CDO NOI, issued on March 15, 2005.
12. Statement of Defense with regards to the rock revetment, submitted on April 14, 2005 with cover letter objecting to recordation of a Notice of Violation and attachments.
13. Statement of Defense with regards violations other than the rock revetment, submitted on April 18, 2005 with cover letter and attachments.
14. Deed Restriction, recorded pursuant to Special Conditions 1 and 7 of CDP No. 5-88-794.
15. Offer to Dedicate a Vertical Access Easement with attachments, recorded on December 12, 1989.
16. Excerpt from City of Malibu Local Coastal Program Implementation Plan: Chapter 13, Section 13.14.